The Uninspected Vessel Sector

The Chao v. Mallard Bay decision

By Jeffrey D. Beech

ON JUNE 16, 1997, an explosion on Mallard Bay's Rig 52 killed four workers and seriously injured two more in Louisiana state waters. Near the end of drilling operations, the well blew out. The off-duty crew was evacuated, while on-duty crew remained aboard in an unsuccessful attempt to regain control of the well. Thirty to 40 minutes after the blowout, the explosion occurred.

The U.S. Coast Guard (USCG) investigated the accident and determined that explosive concentrations of natural gas had spread throughout the atmosphere of the barge as a result of the blowout. It was determined that the explosion most likely originated in the pump room, where a motor was operating that could have produced sparks to ignite the natural gas. USCG concluded that the company had not issued any specific directions regarding blowout control; that supervisory personnel had not followed the company's existing emergency procedures; and that they had not recognized the hazard of explosive gas accumulation on the barge and had not ordered the evacuation of on-duty personnel.

However, because USCG had no regulations regarding these matters, the case was referred to OSHA. That agency subsequently cited the owners for violations relating to failure to evacuate workers in a timely manner; failure to have an emergency response plan; and failure to provide worker safety training. Mallard Bay's parent company, Parker Drilling, contested the citations to OSHA's administrative law judge and the Occupational Safety and Health Review Commission, arguing (unsuccessfully) that Rig 52 was not a "workplace" as defined in the OSH Act and that USCG statutory duty to regulate the safety and health of seamen precluded OSHA from exercising jurisdiction over the conditions on its vessel. The decision was appealed and overturned by the Fifth Circuit, which held that "the Coast Guard's comprehensive regulation and supervision of seamen's working conditions [creates] an industry wide exemption [from the OSH Act] for seamen serving on vessels operating on navigable waters." The Dept. of Labor then appealed the decision to the U.S. Supreme Court.

On Jan. 9, 2002, in *Elaine L. Chao, Secretary of Labor v. Mallard Bay Drilling Inc.*, the U.S. Supreme Court ruled that OSHA does have jurisdiction over issues relating to the safety and health of workers aboard U.S.-flagged commercial vessels in the "uninspected" sector. The high court ruled that since USCG had "neither affirmatively regulated the working conditions at issue, nor asserted comprehensive regulatory jurisdiction over working conditions on uninspected vessels, it has not *exercised* its authority" [emphasis added].

Citing the language in the OSH Act that "nothing in this Act shall apply to working conditions of employees with respect to which other federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health," the high court went on to say that when Congress grants a regulatory body authority to regulate, the presumption is that that body will exercise its authority. Failure to exercise regulatory authority is cause for another regulatory body, with proper authority, to assume that authority and to intervene and regulate conditions. As the OSH Act charges OSHA with prescribing occupational safety and health rules, and "to assure so far as possible . . . safe and healthful working conditions" for "every working man and woman in the Nation," the void created by USCG's failure to regulate the working conditions on uninspected vessels was properly filled by OSHA (*Elaine L. Chao*).

The Mallard Bay decision did not go so far as to grant exclusive jurisdiction to OSHA, but instead relied on the fact that a regulatory void existed in the uninspected sector. While USCG and its predecessors have historically had jurisdiction over these vessels, the agency had only exercised its authority over certain specific aspects of safety and health condi-

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tions aboard these vessels. The Supreme Court ruled that this failure to regulate created a void where no federal agency was enforcing regulations to protect workers in this industry, leaving OSHA free to exercise its authority under 29 CFR 1910.

In the decade prior to this decision, vessel operators had successfully fended off several attempts by members of Congress to grant OSHA broad jurisdiction over U.S.-flagged vessels. During the 1990s, several bills introduced in the U.S. Senate and U.S. House of Representatives sought to more clearly establish OSHA's authority over U.S. vessels engaged in waterborne commerce in U.S. territorial waters. None of them ever made it to the floor of either chamber, however. In addition to the legislative attempts to involve OSHA in safety and health issues aboard uninspected vessels, several federal court decisions in the 1980s and 1990s addressed this issue, generally without distinction between regulations regarding inspected vessels and those regarding uninspected vessels.

The Uninspected Vessel Sector

An estimated 180,800 commercial vessels operate in the U.S., about a third of which are classified as uninspected. The term "uninspected vessel" arises from language used in the Steamboat Act of 1852 (as amended). That act established an inspection regime for boats equipped with or powered by steam engines. In 1871, Congress broadened the act to include oversight of crew and passenger safety. After the turn of the century, with the advent and growing popularity of diesel engines for propulsion and auxiliary power, the Steamboat Inspection Service and its successors, the Bureau of Marine Inspection and Navigation and USCG, focused on inspection of vessels equipped with steam, inspection of passenger vessels and the licensing of masters and chief mates (Bureau of Marine Inspection and Navigation). Thus, diesel-powered or nonpowered vessels that did not carry passengers for hire were exempt from USCG's inspection regime.

However, while USCG does not regularly inspect these vessels, that does not mean that their operations are not regulated by the Coast Guard. Regulations found at 46 CFR apply to towing vessels, some passenger vessels (six passengers or less), manned and unmanned barges—none of which is regularly inspected. In addition, some USCG regulations at 33 CFR and 46 CFR are specific to operations on uninspected vessels. Broadly, they cover:

- personal flotation devices and other lifesaving devices;
- fire extinguishing equipment;
- backfire flame control;
- pollution control;
- manning and licensing;
- vessel documentation and chemical testing;
- ventilation of tanks and engine spaces;
- emergency locating equipment.

Based on these regulations, uninspected vessels are subject to boarding at any time by USCG, which may check for violations limited to the following areas: safety check of basic firefighting equipment; safety check of approved life jackets and lifesaving equipment; ventilation of engine bilges and fuel tank compartments; and backfire/flame arresters on inboard engine carburetors using gasoline as a fuel. In contrast, regulations for inspected vessels call for USCG to exercise full authority for the safety and health of seamen assigned to these vessels. In fact, OSHA refers all safety and health complaints from workers on inspected vessels to USCG for determination of whether the events or conditions in the complaint constitute hazardous conditions. Other aspects of operations on uninspected vessels are regulated by other federal agencies as well. For example, Federal Communications Commission and EPA each have regulations addressing the equipment and operations of these vessels, although these rules do not regulate worker safety and health.

The Question of Jurisdiction

As noted, the Mallard Bay action is not OSHA's first attempt to exercise authority over activities on marine vessels. After the agency issued citations regarding working conditions aboard the drill ship *Mission Viking*, the vessel's owners contested the citations (Mary B5). On the eve of oral arguments in the case, OSHA withdrew. As a result of that case in 1983, in order to more clearly define their roles with regard to inspected vessels, USCG and OSHA issued a memorandum of understanding (MOU) memorializing the Coast Guard's sole jurisdiction over inspected vessels.

Generally, the Appellate Bench in the Fifth Circuit has held that oversight of vessels by USCG, as prescribed by Congress, pre-empted OSHA's authority to enforce rules aboard those vessels. In fact, in 1980 and again in 1983, the Fifth Circuit held that "the law of this circuit is that OSHA regulations do not apply to working conditions of seamen on vessels in navigation" (Mary B5). Disregarding the MOU, the Fifth Circuit held that "it is not for modalities of the federal power to trade functions between themselves in perpetuity by agreement; the will of the Congress must control" (Mary B6).

As is not uncommon in the federal judiciary, appeals courts in the Second and Eleventh circuits held that the OSH Act was, in fact, applicable on uninspected vessels. The 1984 case in the Second Circuit, *Donovan v. Red Star Marine* (Mary B11), used essentially the same logic which the Supreme Court used in *Chao v. Mallard Bay*—that any area of worker safety and health not specifically regulated by USCG (e.g., noise hazard prevention) would be subject to regulation by OSHA. In that same case, the Second Circuit added that the "mere presence of statutory authority [to regulate] . . . [without] an actual, concrete exercise of that authority" meant that USCG's silence on an issue allows for OSHA's intervention.

Courts in the Third and Eleventh circuits adopted the reasoning of the Second Circuit court in allowing OSHA jurisdiction over maritime operations, while

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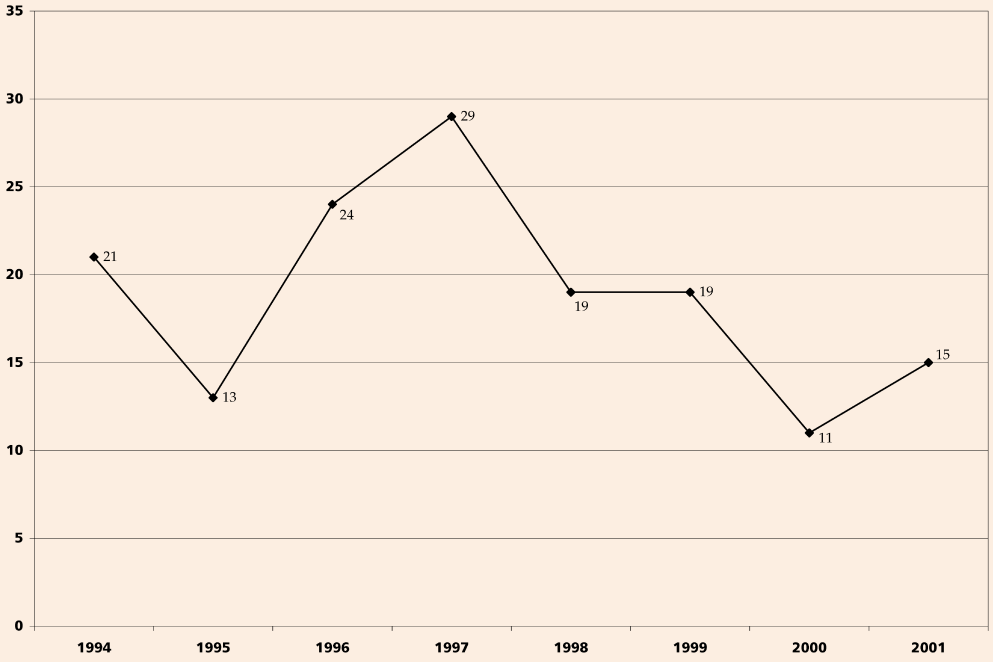
Figure 1

Fatalities on Uninspected Vessels (Excluding Fishing Vessels), 1994 to 2001



courts in the Fourth and Ninth circuits agreed with judges in the Fifth Circuit and found that "the Coast Guard is the primary federal agency which exercises authority over the working conditions of seamen" (Mary B9). A decision from the Fourth Circuit states in part that "the Coast Guard has responsibility for the safety of 'seamen' under regulations issued by it, whereas the Dept. of Labor, under OSHA, has statutory responsibility for the safety of longshoremen at work under regulations issued by it. *The respective responsibilities, thus established, are exclusive*" [emphasis added] (Mary B10).

Thus, for several years prior to the Mallard Bay decision, whether a marine operation was under OSHA jurisdiction or not was entirely the function of its geographic location. Of course, those operations located in several jurisdictions could literally sail from regulated to nonregulated status and back, with respect to OSHA standards.

The split jurisdiction regime established by the Mallard Bay decision with regard to the uninspected sector is not unique to this sector. In 1979, USCG and OSHA signed an MOU relating to "artificial islands, installations and other devices" on the outer continental shelf. Although USCG inspects each of these installations annually, OSHA retains the right to enforce any working condition standards not regulated by the Coast Guard. This arrangement is parallel to the arrangement that has developed in the uninspected sector as a result of the Supreme Court's Mallard Bay decision.

Sector Accident Statistics

USCG has gathered accident and injury data for several years, but has only recently begun to collate the information into a useable database for measuring the efficacy of initiatives and programs aimed at the safe operation of vessels under its regulatory authority. According to David Dickey of USCG's Office of Investigation and Analysis, no discernable trend is evident in the number of fatalities in the water transportation industry for the years 1994 to 2001 (Dickey). Similarly, information from Bureau of Labor Statistics (BLS) shows a cyclical incidence of fatal accidents, with highs and lows alternating on about a six-year pattern, with 19 fatalities a year being the average over the period discussed (Figure 1).

Unfortunately, these data sources do not correlate the number of fatalities with the number of hours worked within the sector as a whole or with any other measurement that would allow for computation of an incidence rate, or for some explanation of the cycle of fatal accidents (e.g., extraordinarily severe weather, catastrophic losses). Furthermore, neither USCG nor BLS separates the "water transportation" sector statistics by inspected or uninspected vessels. However, BLS specifically excludes fishing vessel accidents from its statistics.

In sharp contrast, footnotes dated May 2001 in the brief on the merits of the *Chao v. Mallard Bay* decision paint a far more dire picture of the fatality and injury rate among seamen serving aboard the more than 68,000 U.S.-flagged uninspected vessels (*Elaine L. Chao*). According to this source, USCG reported that between 1996 and 2000, an average of 100 deaths and 600 injuries occurred annually within this sector. Figure 2 illustrates the breakdown of fatalities in the uninspected vessel sector as a whole.

The disparity between these two data sets is due to the fact that the figures quoted in the footnote to the Supreme Court brief include casualty figures from the uninspected fishing vessel sector. This sector is by far the most dangerous within the uninspected vessel category, with an average of 78 deaths per year between 1992 and 1999, according to both USCG and BLS.

Other Marine Sectors

The (uninspected) commercial fishing industry got OSHA's attention in the late 1980s, which led the agency to assert its authority even on U.S. vessels on

the high seas—that is, outside of U.S. territorial waters—based on the fact that the ships were based in U.S. ports. OSHA's position was that since these fishing voyages originated and terminated in U.S. ports, they were subject to OSHA regulations. In one case involving a fish-processing vessel, USCG acknowledged that it had not exercised authority over the "factory" operations of the vessel. While these cases were being decided in the courts, Congress passed the Commercial Fishing Vessel Safety Act of 1988, which changed the status of certain larger commercial fishing vessels from "uninspected" to "inspected." This made USCG responsible for regulation and enforcement. In the fishing vessel sector, USCG did prescribe regulations requiring that rotating machinery be covered and guarded, as well as regulations governing living conditions aboard these vessels.

Smaller fishing vessels with no onboard "factory" operation continue to be uninspected by the Coast Guard, although the Fishing Vessel Safety Act of 1991 mandated monthly safety drills to be conducted by trained personnel on all U.S.-flagged fishing vessels. USCG and BLS report that the uninspected fishing vessel sector has a fatality rate 20 to 30 times greater than that of any other single industry. For the period between 1992 and 1996, casualties equaled 140 deaths per 100,000 workers engaged in the occupation, compared to five deaths per 100,000 for all U.S. industry (Dickey).

Responsible Carrier Program

On Sept. 22, 1993, the USCG-licensed operator of the tug *M/V Mauvilla* mistakenly left the Mobile River, entered nonnavigable Big Bayou Canot and struck a railroad bridge with her six-barge tow in thick fog. Minutes later, when Amtrak's Sunset Limited attempted to cross the bridge, it derailed, causing 47 deaths, many injuries and extensive property damage to both the train and the bridge. Subsequent investigation revealed that the tug operator was using his boat's radar, but had it set on too-high a scale, making it virtually useless in the confines of an inland river (Gregory). As a result, USCG mandated that all towing vessel operators attend and stay current on radar observer training.

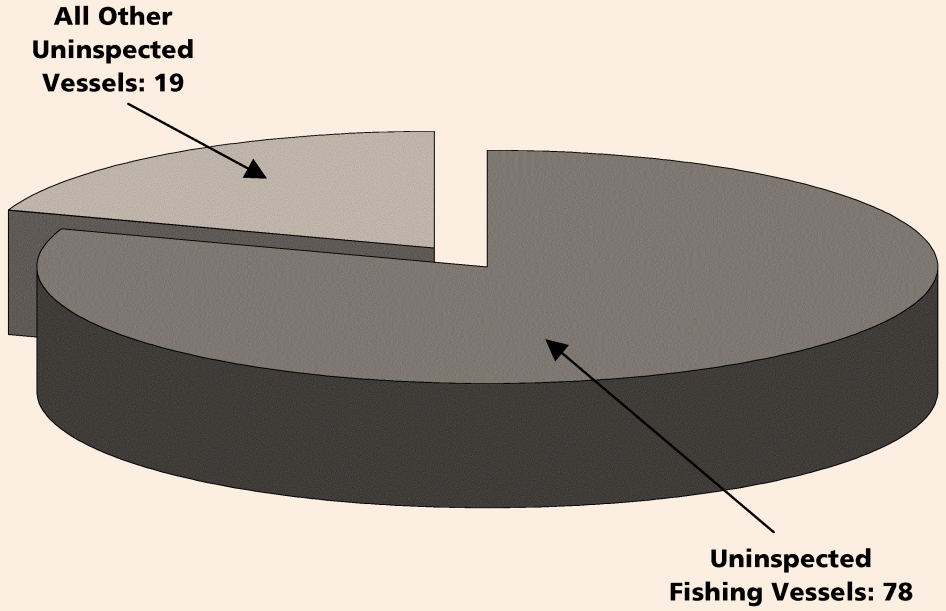
Although this accident was primarily due to human error and poor training, the uninspected sector within the industry took steps to ensure that the equipment operated in this sector is inspected and that the inspections are documented; they also took action to ensure that the equipment is maintained above the minimum requirements specified in 46 CFR. USCG, along with the American Waterways Operators (AWO), the predominant industry trade group, developed a system of self-inspections, roughly equivalent to the program used by U.S. railroads. This program, called the Responsible Carrier Program (RCP), calls for a periodic third-party audit and inspection; it was fully adopted and implemented by January 1998 (AWO).

Just as AWO member companies have operations in diverse locations and conditions with widely varying types of equipment, RCP sought to establish a framework over which companies could customize a safety and health program, while addressing the safety and health needs of workers on these vessels and complying with (at a minimum) existing regulations. According to Bob Clinton, AWO's vice president for safety, 49 percent of all marine operators (375 member companies) and 70 percent of all marine equipment in the U.S. are presently covered by RCP. Any company seeking to join AWO has two years to prove compliance with the program. RCP standards are roughly parallel to USCG's inspection regime for inspected vessels; they also incorporate general industry standards from OSHA 29 CFR 1910.

USCG regulations relating to inspected vessels and to fishing vessels are much more exhaustive than those that govern uninspected vessels, with requirements relating to crew accommodations, food service and sanitation, as well as electrical and pressure vessel standards. In 1994, in an attempt by USCG to use its resources to target marginal opera-

Figure 2

Average Annual Deaths: All Uninspected Vessels, 1992 to 2001



Marine operators must assess their operations to determine where they will be affected by this ruling.

tors, a streamlined inspection process was initiated wherein any marine company with a proven record of compliance could perform most of the inspection program independently. A USCG auditor would then audit the vessel's records at the office, then conduct spot checks on a representative number of vessels to complete the fleet inspection [USCG(b)].

This model was largely incorporated into RCP, only using private auditors trained and approved by AWO rather than Coast Guard personnel. An alternate compliance program is presently in effect for vessels that require inspection by USCG and the American Bureau of Shipping (ABS). Under this program, USCG, based solely on the strength of a positive ABS inspection, will issue a certificate of inspection to a vessel meeting the standards to the satisfaction of the ABS inspector [USCG(a)].

While RCP makes reference to applicable standards at 29 CFR 1910, it does not require that occupational safety and health records be maintained. Additionally, RCP, by virtue of its highly adaptable, "customizable" nature, allows operators to opt out of certain sections of the program deemed unsuited to their particular operation, or to adopt a program that does not meet the applicable OSHA standard. For example, the RCP requirement for PPE does not establish hazard identification levels for noise exposure, nor does it address audiometric testing or training, other than a generic requirement for training on any article of PPE issued to or required by crews.

The Ruling: Aftermath

Generally, vessel operators did not welcome this decision, as it put a layer of federal bureaucracy in place over their operations—in an area already viewed as sufficiently regulated and policed by USCG. Additionally, vessel operators thought they could more readily work with USCG, the agency with which they had regular contact and that was more likely to understand maritime operations. Not every marine operator will have to comply with all OSHA requirements, but they will be forced to assess their operation and the standards to determine where they will be affected by the change in regulatory regimes. At a minimum, companies will have to adopt the applicable standards and develop programs that will satisfy OSHA regulations. (These issues are addressed in the companion article that begins on pg. 35.)

Interestingly, marine employers are specifically excluded from the requirements of 1910 Subpart E, which requires employers to develop and implement an emergency action plan, and ensure that employees are aware of means of egress from the workplace and are trained in emergency procedures. These are the very regulations that OSHA cited in the case that became the basis for the decision in *Chao v. Mallard Bay.* It seems that Mallard Bay did not press the issue of exclusion from this particular subsection, but relied instead on the issue of OSHA jurisdiction. Curiously, another regulation that specifically excludes the marine industry is 1910.147, Control of Hazardous Energy (lockout/tagout).

Affected operators must also be aware that penalties for violation of OSHA regulations range from $5,000 to $70,000 per violation in the most egregious cases. Proposed penalties may be adjusted downward for good-faith efforts at compliance, or upward for willful or repeated violations. Willful violations resulting in a fatality, falsification of records, and assaulting or otherwise interfering with a compliance officer can bring fines of $10,000 to $250,000, and up to three years' imprisonment for individuals. Companies face fines of $500,000 for willful violations that result in a fatality. ■

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